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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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BRIEF AMICUS CURIAE OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION FILED IN SUPPORT OF SHARPER IMAGE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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CASS D. VICKERS
VICKERS MADSEN & GOLDMAN, LLP
1705 Metropolitan Blvd,
Suite 101
Tallahassee, FL 32308
(850) 523-0400
Counsel for Amicus Curiae Institute for Professionals in Taxation

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STATEMENT OF INTEREST OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION

The Institute for Professionals in Taxation (IPT),[1] is a not-for-profit corporation organized under the laws of the District of Columbia. IPT was incorporated in 1976. It has offices at One Capital City Plaza, 3350 Peachtree Road NE, Suite 280, Atlanta, Georgia 30326-1040. IPT was organized for the purposes of 1) promoting uniform

[1] Formerly the Institute of Property Taxation. The parties have consented to the filing of this brief and their letters have been filed with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

and equitable administration of state and local taxes (excepting income taxes) and 2) minimizing costs of administration and compliance with such taxes. The two taxes with which its members are prinicipally concerned are sales and use taxes and property taxes. IPT's membership comprises more than 3,800 tax professionals, representing more than 1,400 businesses, large and small, from across the United States. The membership includes employees who have direct responsibility for sales and use tax compliance in the states in which their companies do business. Also included are attorneys, accountants, and other independent tax consultants who are regularly called upon to advise clients with respect to their sales and use tax rights and obligations.

IPT's purposes are pursued through various efforts. It acts as a national information exchange with respect to state and local tax issues. The organization disseminates new state legislative proposals and enactments, rules, forms, instructions and rulings from taxing authorities, and judicial decisions arising from state and local tax disputes, together with analyses of and commentaries on such authorities. Each year IPT conducts two week-long schools in sales and use taxation, as well as forums, symposia and conferences at which relevant tax issues are explored in depth. In 1999, for example, it is co-sponsoring an advanced sales tax seminar with the American Bar Association. IPT has created a professional certification program, designating as Certified Members of the Institute (CMIs) those members who have accrued the requisite state and local tax education and experience and demonstrated their proficiencies through rigorous written and oral examinations.

Its commitment to uniform and equitable tax administration also leads IPT into various initiatives involving government officers and their associations like the International Association of Assessing Officers and the Federation of Tax Administrators. IPT delegates participate in

various industry-government roundtables which address recurring and emerging state and local tax issues, such as the Multistate Tax Commission Sales and Use Tax Nexus Guideline talks and the National Tax Association's Communications and Electronic Commerce Tax Project. IPT also hosts numerous local luncheons for the purpose of bringing representatives of taxpayers and tax administrators together to discuss liability and administrative issues.

The decisions of this Court in state and local tax cases, the principles which they articulate and those which derive from those pronouncements, figure prominently into the business decisions of IPT members and IPT's educational efforts. As interpretations of national constitutional and congressional policies, they are central to IPT's promotion of uniformity and equity in the administration of tax laws. The Court's rulings are at the heart of the members' daily lives as tax professionals. The opinions dictate the states and local jurisdictions in which returns must be filed. They indicate which transactions may be included in the tax base. They interpret the limitations on the taxing powers of state and local governmental bodies. And in their enforcement of the guarantees against discriminatory and other unlawful taxation, the Court's rulings give some specificity to the states' duties to respond when their revenue measures cross the constitutional line.

While IPT rarely files amicus briefs, its decision to do so in this case reflects its belief that the issue here is one of enormous portent. The question is whether a state may enforce a tax assessment under an admittedly unlawful tax scheme, whether it may do so when the collection of such taxes works a discrimination indisputably forbidden by the United States Constitution. No matter could more compellingly implicate concerns with the equitable administration of state and local taxes than this. Moreover, the businesses from which IPT's membership is drawn, and the IPT tax professionals who advise them,

will find themselves in the position of trying to reconcile the decision below, holding that the taxpayer is not entitled to any remedy, with the *McKesson, Newsweek* and *Dryden* decisions [2] of this Court.

That task will confront them, in particular, as they endeavor to comply with their tax obligations, on the one hand, without forsaking their right to avoid taxes discriminatorily levied, on the other. Whether first to pay taxes believed to be unlawful and then to challenge them, or to withhold payment and challenge an ensuing enforcement action is a decision with which IPT members are confronted on a recurring basis—the Court's disposition of this case will clearly be of substantial import in making such decisions. Believing that this case will substantially affect the advice IPT tax professionals will be called upon to give, and the decisions which their businesses must make, IPT hopes through its participation as Amicus Curiae to present arguments useful to the Court's consideration of the questions presented.

REASONS FOR GRANTING THE WRIT

The decision below cannot be reconciled with this Court's decision earlier this term in *Newsweek, Inc. v. Florida Dep't of Revenue,* 118 S. Ct. 904 (1998). The decision below would yield the implausible result that the State of Florida would hereafter collect from the petitioner, Sharper Image Corporation, the very taxes which it has refunded to Newsweek—use taxes under a scheme which works admittedly unconstitutional results—despite the fact that Newsweek's claim and Sharper Image's include the same discrimination period (1988-1990).[3] Hav-

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[2] *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), *Newsweek, Inc. v. Florida Dep't of Revenue,* 118 S. Ct. 904 (1998), and *Dryden v. Madison County,* 696 So. 2d 728 (Fla. 1997), *vacated* 118 S. Ct. 1162 (1998).

[3] Because Sharper Image's claims also stem from the exemption for religous publications, Fla. Stat. § 212.05(1) (1989), its request

ing been plainly instructed to mitigate the discrimination for the contested tax period in *Newsweek*, the Florida court refuses to do the same for Sharper Image. The Due Process Clause cannot be read to tolerate those two patently contradictory outcomes.

The refusal to mitigate the discrimination is all the more inexplicable when considered in this light: Sharper Image invoked below a predeprivation remedy under the very statute, Fla. Stat. § 72.011, upon which the same Florida First District Court of Appeal premised its denial of relief to Newsweek. The court held that Newsweek was not entitled to "meaningful backward-looking relief" under *McKesson* because it had available under that statute a predeprivation procedure. *Newsweek, Inc. v. Department of Revenue*, 689 So. 2d 361, 363 (Fla. Dist. Ct. App. 1997). Yet the same court has now held that Sharper Image's resort to that predeprivation procedure is likewise ineffective to gain it relief from discriminatory taxation for the contested tax period. In the wake of this Court's *Newsweek* decision, the lower court's stance suggests that Sharper Image should have followed the refund route, a variation on the "bait and switch" tactic which this Court condemned in *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek*.

Newsweek sought and, with this Court's intervention, found relief from unconstitutionally discriminatory taxation for the period 1988-1990. Sharper Image has been denied relief for the same tax for that same period. The only essential difference is that relief for the petitioner here would take the form of an invalidation of the assessment, rather than a refund. Florida's refusal to give the Due Process Clause, U.S. Const. amend. XIV § 1, the same operation in both contexts is indefensible. While the dictates of that constitutional provision as explicated

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for relief pertains to the entire audit period, April 1, 1987 through March 31, 1990, not just the period during which the newspaper/magazine discriminaton was in place.

in the *McKesson* and *Newsweek* opinions seem abundantly clear, Florida appears intent on inventing procedural artifices as justification for denying relief from past discrimination. We find here the unfathomable rationale that Sharper Image's resort to a "predeprivation" procedure (assessment challenge) somehow relieves the State, under *McKesson*, from providing the very remedy (invalidation of the assessment) which that procedure contemplates.

If the states find an invitation to avoid Due Process requirements in the *McKesson* discussion of the states' "flexibility" in mitigating the effects of discriminatory tax schemes, it may be for this reason. The *McKesson* decision, and the long line of precedents from which it grew, arose in the context of postdeprivation, or refund, claims. The Court has not had occasion to say explicitly that the Due Process Clause imperative for mitigating past discrimination is as applicable when the constitutionally defective tax scheme is considered in a case in which the taxpayer has invoked a predeprivation remedy extended to it by state law. While one might think that such equality of treatment should be self-evident, the opinion below suggests otherwise. Certiorari should be granted for the purpose of making clear, in the context of a prepayment assessment challenge, the obligation of the states, whatever approach they choose within the "flexibility" accorded to them, to mitigate unlawful discrimination for the contested tax period.

I. FLORIDA DENIES SHARPER IMAGE ANY REMEDY IN VIOLATION OF *McKESSON* and *NEWSWEEK*

In the *Newsweek* case, the taxpayer sought relief from discriminatory taxation for the period 1988 through 1990. The First Amendment discrimination underlying its refund claim had been previously established.[4] Newsweek's

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[4] *Department of Revenue v. Magazine Publishers of Am., Inc.*, 604 So. 2d 459 (Fla. 1992). Newsweek was not put in a refund

request took the form of a request for a refund pursuant to Fla. Stat. § 215.26. When the Florida courts declined to afford Newsweek that relief, this Court vacated and remanded, pointing to the "long standing practice of permitting taxpayers to seek refunds" under that statute. *Newsweek,* 118 S. Ct. at 905. Rather than pay the tax and use the refund statute as Newsweek did, Sharper Image turned to another procedure for similar relief. Fla. Stat. § 72.011(1)(a) (1989) permitted taxpayers to "contest the legality of any assessment . . ." by filing an action in the State's circuit court.

In availing itself of that procedure, Sharper Image invoked a predeprivation remedy expressly granted to it by the State of Florida. The statute is there precisely for the purpose of allowing taxpayers to challenge the lawfulness of tax assessments; when a taxpayer is successful in establishing that an assessment is illegal, whether on constitutional or other grounds, the statute is the means by which it is invalidated. *See, e.g. Herre v. Florida Dep't of Revenue,* 617 So. 2d 390 (Fla. Dist. Ct. App. 1993), *aff'd* 634 So. 2d 618 (1994). It is not the purpose of actions under Section 72.011(1)(a), Florida Stat-

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posture by happenstance. The State's decision to insist on discriminatory taxes was calculated. In response to the *Magazine Publishers* decision, the Florida Department of Revenue promulgated a rule making newspapers taxable as of December 9, 1990, Fla. Admin. Code Rule 12A-1.008(1)(a) (1994), with the intended effect of leaving Newsweek, Sharper Image and others subject to discriminatory taxes prior to that date. *See discussion of rule at Newsweek, Inc. v. Dep't of Revenue,* 689 So. 2d 361, 362 (Fla. Dist. Ct. App. 1997). Having made a deliberate decision to leave the newspaper exemption in place until December 9, 1990, the State cannot now mitigate the discrimination by back-assessing newspapers. Even if it could somehow eschew its affirmative decision to leave the exemption intact during that period, it would be barred by the applicable statute of limitations from curing the discrimination by back-assessing the favored taxpayers. *See* Fla. Stat. § 95.091(3).

utes to secure general declaratory judgments[5] or other prospective relief. Rather an action challenging an assessment under that statute is concerned with the validity of the assessment, a claim by the State that tax is due for some prior period.

Florida did not deny Sharper Image's right to proceed under the assessment challenge statute. It did, however, refuse to accord the petitioner the only remedy which that statute contemplates in such circumstances.[6] And in the most curiously-twisted logic, it premised the denial of relief, under *McKesson*, upon the taxpayer's right to proceed with the very "predeprivation procedure," a Section 72.011(1)(a) assessment challenge, which Sharper Image was attempting to use. The court's reading of the Due Process Clause was effectively this: since Sharper Image had the privilege, under this statute, of challenging the assessment before paying it (predeprivation procedure), it was not entitled to have the unconstitutional discrimination effected by that assessment undone. The decision renders the Due Process Clause purely illusory in this context. The taxpayer's property may be taken under an admittedly discriminatory tax scheme and because the taxpayer may challenge the taking in advance, it will never be entitled under the Due Process Clause to avoid that discriminatory taking. The ruling prescribes a strangled reading of the Due Process Clause under which taxpayers may assert their constitutional rights with respect to the contested tax period, but will never be entitled to have them vindicated.

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[5] Another statute is available for that purpose. Fla. Stat. § 86.011 (1997).

[6] The court's suggestion that it was granting Sharper Image the remedy of striking the exemption for newspapers is disingenuous. *See* App. 16a, fn. 8. That "remedy" had been secured some five years earlier in *Magazine Publishers*, by another party in unrelated litigation. And though acknowledging the unconstitutionality of the exemption for religious publications, the court declined to reach this issue so that no consideration was given to the remedy which might flow from a ruling on this point.

The lower court's disposition is, if anything, more egregious than its refusal to approve a refund of taxes to Newsweek. Sharper Image has not paid the assessment. The monies are not in the State treasury. The State is not in the position of having its fiscal planning upset by the need to make unanticipated refunds.[7] To the contrary, the lower court's ruling would augment the State fisc with taxes discriminatorily laid. It would insist on the payment of taxes even though such enforced payment would work a discrimination the unconstitutionality of which is conceded. In *Catch-22* fashion, the ruling would enforce the collection of taxes which, if paid, would have been subject to refund pursuant to *Newsweek*.[8]

The discrimination would be further exacerbated by the imposition of interest accruing at an annual rate of twelve percent, Fla. Stat. § 212.12(3) (1989), and penalties of up to twenty-five percent, Fla. Stat. § 212.12(2)(a) (1989). The enforcement of those discriminatory taxes would be backed up by the Department of Revenue's power to revoke Sharper Image's right to do business in Florida, Fla. Stat. § 212.18(3) and to record liens against, seize and sell its property for the amounts due, Fla. Stat. § 212.15(4). In short, the State would insist on visiting that discrimination on Sharper Image in 1999

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[7] The State might not be heard to complain too vigorously on this point anyhow. After the states were invited to address this concern through various means, including enactment of a short statute of limitations period for such refund claims, in *McKesson* 496 U.S. at 45, Florida *lengthened* the period during which tax refunds could be claimed from three to five years. Fla. Stat. § 215.26(2) (1997).

[8] In fact, the State could continue to assess the discriminatory tax against other taxpayers like Newsweek for the period 1988-1990 if they failed to file a return, Fla. Stat. § 95.091(3)(a)1.d (1997). The State might then be assessing and collecting the same use tax from some taxpayers which it is simultaneously refunding to others, those for example who were late in paying such taxes and whose refund claims are still open under the five-years allowed by Fla. Stat. § 215.26(2).

despite the fact that the courts identified it and found it at odds with the assurances of the First Amendment to the United States Constitution in 1992. It is hard to imagine a plainer or more contemptuous departure from the long-standing mandate for a "clear and certain remedy" put forward in *Atchison, T & S. F. Ry. Co. v. O'Connor,* 223 U.S. 280, 285 (1912). Despite Florida's dubious role in the development of Due Process remedy rulings by this Court in the *McKesson, Newsweek* and *Dryden* cases, the State has denied any meaningful remedy to the petitioner.

II. *McKESSON* REQUIRES RELIEF FOR THE CONTESTED TAX PERIOD

That the lower court has misapplied *McKesson* is manifest. It has said that Sharper Image is not entitled to "meaningful backward-looking relief." *See* App. 12a. It has emphasized that *McKesson* addressed itself to the situation in which the taxpayer was relegated to post-payment action and found the ruling inapplicable on grounds that Sharper Image had the illusory "predeprivation procedure" described earlier in this brief. Yet the *McKesson* opinion, and the rulings on which it is based, stress the taxpayer's right to relief "for the contested tax period."

In reply to the state's argument that declaratory and injunctive relief prohibiting future discrimination satisfied the commands of the Due Process Clause, this Court responded that:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a States places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

See McKesson, 496 U.S. at 31. While it is true that the Court spoke of "meaningful backward-looking relief" in a statutory scenario which accorded the taxpayer no pre-deprivation procedure, it is equally clear that the Court found in the Due Process Clause the dictate for mitigating past discrimination. That is the meaning of the mandate to "rectify" the deprivation to which McKesson had already been subjected. The *McKesson* opinion found the taxpayer entitled not just to prospective relief, but "to a refund of the excess tax paid—at least unless the disparity is removed in some other manner." *See McKesson,* 496 U.S. at 35. There is no rational basis for reading the Due Process Clause as requiring the elimination of such prior "disparities" when the taxpayer seeks a refund, but as giving sanction to precisely the same disparate taking of a taxpayer's property when the taxpayer opts to challenge an assessment. In fact, the Court refers to the two types of actions as counterparts, describing a refund action as one in which taxpayers have made payment "prior to resolution of any dispute over the validity of the tax assessment." *See McKesson,* 496 U.S. at 37.

The *McKesson* opinion speaks of the need to " 'undo' the unlawful deprivation," 496 U.S. at 38, and of providing a refund in order to "erase the property deprivation." *Id.* It contemplates that the "clear and certain remedy" for an illegal tax scheme first referred to in *Atchison, T. & S. F. Ry. v. O'Connor,* 223 U.S. at 285, ensure that there be no "permanent unlawful deprivation of property." *See McKesson,* 496 U.S. at 40. That the *McKesson* ruling construes the Due Process Clause as requiring the mitigation of discriminatory taxation for the period which gave rise to the action cannot be doubted; the opinion refers to the need for relief "during the contested tax period" no less than eleven times. The Florida court's reading of *McKesson* substantially diminishes the guarantees afforded by the Due Process Clause, finding them inapplicable with respect to the contested tax period and overridden by a statute expressing the State's desire to

enforce even those assessments which are part of an unconstitutional scheme.

III. THE STATES WILL EXPLOIT OPPORTUNITIES TO AVOID DUE PROCESS REQUIREMENTS UNDER THE *McKESSON* LINE OF CASES

The *McKesson* opinion does not imply that the need to "create in hindsight a nondiscriminatory scheme" is avoided by the provision of a "predeprivation procedure." [9] Rather it contemplates that a "predeprivation procedure" will preclude discriminatory or otherwise unlawful taxes being exacted in the first place. The Court has never held that if taxpayers are given the advance opportunity of challenging the constitutionality of an assessment, they forfeit their right to be relieved of discriminatory taxation "during the contested tax period." The right to relief with respect to the contested tax period is explicit. It is not a function of the taxpayer's election as between a predeprivation and a postdeprivation procedure. The Court has not said that states may enforce assessments under a discriminatory tax scheme as long as they refrain from assessing for periods following the illegal scheme's exposure. Yet those are the readings of this Court's *McKesson* decision by the lower court here and the result which other states will impose, relying in part on statutes striking exemptions and retaining the levy provisions. *See* Pet. at 18.

If there is any room for such misconstruction by the states, it may stem from the pattern which the *McKesson* line exhibits—they are cases in which the taxpayer paid

[9] Between the *Newsweek* case and that of Sharper Image here, Florida's posture appears to be that whatever State-offered procedure a taxpayer employs, it is the wrong one; there is none, in the State's construct, which will afford relief for the contested tax period. Even if there were some third procedure (besides challenging an assessment or seeking a refund), Sharper Image could not now be denied relief for failing to use it. That is the "bait and switch" lesson in *Reich* and *Newsweek*.

the taxes in question, under duress, and sought relief in the form of a recovery of the contested amounts. The *Atchison* case, *supra,* was a claim for the recovery of capital stock taxes paid under duress. In *Ward v. Board Of County Commissioners,* 253 U.S. 17 (1920), a refund was sought of taxes coercively collected against Native American allotments. The decision in *Montana Nat'l Bank v. Yellowstone County, Montana,* 276 U.S. 499 (1928) addressed a claim for recovery of stock taxes paid under protest. In *Carpenter v. Shaw,* 280 U.S. 363 (1930), the Court was confronted with an action to recover royalty taxes paid by Choctaw Indians under compulsion. *Iowa-Des Moines Nat'l Bank v. Bennett,* 284 U.S. 239 (1931) concerned a demand for the refund of bank stock taxes paid under threat of seizure of property. The taxpayer in *Baachus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984) sought a refund of wholesale excise liquor taxes paid under protest. *McKesson* was also a refund action, as were other notable *McKesson* progeny, such as *Reich v. Collins,* 513 U.S. 106 (1994) and *Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996).

The states can be expected to continue their exploitation of the *McKesson* reference to their "flexibility" in responding when discriminatory tax schemes are successfully challenged. They will have every incentive to do so if they are permitted to enforce discriminatory assessments pertaining to periods which predate judicial acknowledgment of the tax scheme's constitutional infirmities. They will invoke the Court's initial deference to state law in fashioning remedies, as here, to disregard the Due Process Clause requirement for curing "the mischief [already] done."[10] As grounds for declining to eliminate unlawful discrimination for the contested tax period, the states will resort to statutes like the one relied on by Florida in this case, describing the remedy as the striking of exemptions. In addition to the statutes of some thirteen states which

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[10] *See Montana Nat'l Bank,* 276 U.S. at 504.

are express on this point, *see* Pet. at 18, the states can also be expected to rely on general severability provisions. *See e.g., Fulton Corp.*, 516 U.S. at 347 where the Court alludes to the possibility that the discriminatory taxation of intangibles in North Carolina might be cured by invalidating, under a severability clause, the deduction giving rise to the discriminatory treatment. As they have attempted to justify revenue misdeeds of constitutional proportion on the basis of "equitable considerations," *see Dryden, supra*, the states will point to the existence of some theoretical "predeprivation procedure," as in this case, to avoid reckoning with the requirement that their tax schemes be consistent with the provisions of the United States Constitution **at all times** and not just after they are found out. *See e.g., PIA New Jersey, Inc. dba Fair Oaks Hospital v. Director, Div. Of Taxation*, 13 N.J. Tax 94 (1993) (declining to grant a refund on grounds, among others, that the taxpayer did not pay under duress but could have availed itself of a prepayment challenge).

The states' profound reluctance, in the face of an admittedly unconstitutional tax scheme, to grant relief for prior periods is obvious. It is, in fact, their determination to etch away the Due Process rights of taxpayers, through the fabrication of procedural bars under *McKesson* and by resort to statutory and non-statutory concerns with the preservation of state treasuries, which suggests the importance of granting certiorari in this case. The Court should grant certiorari for the purpose of saying explicitly that the Due Process Clause requires meaningful backward-looking relief (whether by abatement of an assessment or by the assessment of those taxpayers which benefitted from the unconstitutional discriminaton) even when the taxpayer has not paid under duress, but has pursued a predeprivation procedure. No room should be left for the contention that the Due Process Clause operates for the benefit of those who seek refunds, but not for those who challenge an assessment of the same taxes. The

Court shoud grant certiorari for the purpose of clarifying that the "predeprivation procedure" mentioned in *McKesson* is one which allows the taxpayer to avoid having a discriminatory assessment enforced aganst it, a procedure which is a true Due Process counterpart to the "meaningful backward-looking relief" which a refund or other **post-payment** equalizer represents.

The Court should make clear that the "flexibility" accorded the states must always accommodate the Due Process Clause prohibition against an unlawful taking of property, that mitigation of past discriminaton is required in every instance and that the only matter left to the states is the means for eliminating the past and future effects of the discriminatory tax scheme. Certiorari should be granted in order that the Court may pronounce the ineffectiveness of statutory provisions expressing an intention to strike or sever exemptions and save taxes as a means of deflecting the Due Process Clause. And it should be granted to make clear that a taxpayer which has been subjected to an assessment under an unconstitutional tax scheme is entitled to relief from that assessment, in addition to its right to be free from such unconstitutional taxation in the future. Thus such rights would obtain even if the wrongfully-assessed taxpayer were to depart the state's jurisdiction and so never again be subject to its taxes. If the Court does not see fit to grant certiorari, the states will have every reason to ascribe truncating constructions to the Due Process Clause under *McKesson* and to invoke other statutory obstacles, notwithstanding the contrary import of *Newsweek* and *Dryden*. Taxpayers, on the other hand, will have lost the incentive for asserting their constitutional rights in a prepayment challenge; those who do so rather than paying the tax and seeking a refund will find themselves caught in a constitutional trap for the unwary. And notions of fair play between government and the governed will have slipped a little further away.

CONCLUSION

Like *McKesson* and *Newsweek*, this case presents an issue which is not confined to the State of Florida. Its implications are not restricted to use tax assessments. Other taxes might just as plainly contravene the strictures of the First Amendment or transgress other constitutional limits. The question at hand is the states' obligation under the Due Process Clause to respond in such circumstances. That is a matter of vital interest in every state in the nation and one which does not hinge on the type of revenue measure giving offense. For the reasons offered by the petitioner and those advanced herein, Amicus Curiae, the Institute for Professionals in Taxation, therefore urges that Sharper Image's petition for writ of certiorari be granted.

Respectfully submitted,

CASS D. VICKERS
VICKERS MADSEN &
GOLDMAN, LLP
1705 Metropolitan Blvd,
Suite 101
Tallahassee, FL 32308
(850) 523-0400
Counsel for Amicus Curiae
Institute for Professionals
in Taxation